UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

QUANTUM ELECTRIC, INC.

and **CASE 16-CA-22918**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 520

Jamal M. Allen, Esq., for the General Counsel.
Michael E. Avakian, Esq., of Smetana & Avakian, Springfield, VA, for the Respondent.
Michael Murphy, Associate Business Manager/ Organizer, for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Austin, Texas on December 4 and 5, 2003. International Brotherhood of Electrical Workers, Local 520 ("the Union") filed the charge in this case on July 8, 2003.[1] The complaint issued September 30, alleging that Quantum Electric, Inc., the Respondent, violated Section 8(a)(1) and (3) of the Act. Specifically, the complaint alleges that the Respondent, through its president Michael Shayne Goodrum, violated Section 8(a)(1) of the act on May 10 by orally promulgating a rule prohibiting its employees to discuss their wages, unlawfully instructing an employee not to disclose the identity of the Respondent's employees to the Union, and interrogating an employee about his union activities; and on May 12 by implicitly threatening an employee with bodily injury, creating the impression that the employee's union activities were under surveillance, soliciting an employee to withdraw from the Union and conditioning the employee's continued employment on his withdrawal from the Union. The evidence at the hearing revealed that these statements allegedly were made during one-on-one conversations between Goodrum and employee Mike Lien. The complaint further alleges that the Respondent discharged Lien on May 12 because of his union membership, activities and support.

On October 10, the Respondent filed its answer to the complaint, denying that it committed the unfair labor practices alleged and asserting several affirmative defenses. Specifically, the Respondent asserted that the complaint was barred by Section 10(b) of the Act because the underlying unfair labor practice charge was not served upon the Respondent by the Charging Party within six months of the alleged unfair labor practices; that any statements about the Union made by Goodrum to his employees were protected expressions of opinion under Section 8(c) of the Act; and that Lien's termination of employment was for legitimate

[1] All dates are in 2003 unless otherwise indicated.

business reasons unrelated to any protected activity. The Respondent also asserted several affirmative defenses that would be relevant to a refusal to hire allegation, which does not appear in the complaint.

Before turning to the merits of the allegations in the complaint, I must address the Respondent's Section 10(b) defense. There is no dispute, and the formal papers establish, that the charge was filed by the Union and served upon the Respondent by the Board's Regional Office within the six-month period prescribed by the Act. The Respondent, in its defense, argues that service by the Region does not satisfy the Act's requirements, that the Charging Party must accomplish service within the six-months statute of limitations. While it is true that Section 102.14 of the Board's Rules and Regulations places the ultimate burden of ensuring timely service of the charge upon the charging party, the Board and the courts have historically held that service by the Board's regional office is sufficient, as long as it is timely. See *T.L.B. Plastics Corp.,* 266 NLRB 331, fn.1 (1983) and cases cited therein.[2] Accordingly, I shall reject this affirmative defense.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is an electrical subcontractor in the construction industry with an office and principal facility in Round Rock, Texas and job sites in the greater Austin, Texas area. The Respondent annually purchases and receives at its Round Rock facility goods and materials valued in excess of $50,000 directly from points located outside the State of Texas. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Evidence

The Respondent is a non-union electrical contractor in the Austin area. Michael Shayne Goodrum, referred to in the record as Shayne, is the president of the company, which he formed in 1988. The only regular employees the Respondent has, in addition to Goodrum himself, are his wife, Michelle, who serves as the office manager and handles all the bookkeeping and payroll functions, and Shanna Hendrix, the receptionist/office clerical. The Respondent hires electricians by the job, following a policy that purports to favor the use of employees on loan from other electrical contractors, and temporary agency employees, before hiring direct employees. According to Goodrum, this policy reduces the Respondent's overhead and minimizes the paperwork and other obligations, such as providing workers compensation insurance and paying unemployment and payroll taxes, that come with hiring employees.

[2] *Kelly v. NLRB,* 79 F.3d 1238 (1st Cir. 1996), cited by the Respondent, involved a situation where the charge was not served by the regional office until after the six-months period had expired. The court affirmed the Board's holding that administrative delay did not excuse the Charging Party's failure to ensure service within the statutory period.

Despite the existence of this policy, the Respondent has hired employees, many on a repeated basis, when it makes sense to do so because of the number of contracts outstanding, the nature of the work to be performed or the duration of the job at issue. The Respondent's own records reveal that, at least until May 12, Lien was one of the people the Respondent utilized as an employee on a regular basis.

Lien has worked in the electrical trade for six (6) years and is still an apprentice. He dropped out of an apprenticeship program run by the Independent Electrical Contractors Association before the end of his second year. According to the witnesses at the hearing, it typically takes four years to advance from an apprentice to a journeyman electrician. Although Lien characterized his skills as those of a fourth-year apprentice, Goodrum and two journeyman who worked with him for the Respondent, Johnny Minikus and Mickey Crowell, testified that his skills were closer to those of a second-year apprentice. Nevertheless, despite Goodrum's seeming low regard for Lien's expertise, he managed to find work for him to do, on a fairly regular basis, for over three years. The record does not indicate the number of other electricians, journeyman or apprentice, who worked for the Respondent on such a regular basis or for similar lengths of time.[3]

Lien first worked for the Respondent from February 8, 2000 until January 26, 2001. During that time, he worked at several jobs and was transferred from one job to another as work was completed. On January 26, 2001, he was granted a leave of absence so he could move to Amarillo, Texas to be with his wife and child. In July, 2001, having been unable to find work in Amarillo, Lien returned to Austin and called Shayne Goodrum to see if he had any work. Goodrum re-hired Lien and had him fill out a new application, which is dated July 31, 2001.[4] Lien then worked for the Respondent, again going from job to job, until he was laid off for lack of work on February 11, 2002. Lien testified that he collected unemployment for a while and called Shayne Goodrum periodically, inquiring about work, until he was re-hired on May 20, 2002. Lien did not fill out a new application at that time. Lien worked for the Respondent from May 20 to August 23, 2002 and again from October 8 to December 16, 2002. The records contain no other employment applications filled out by Lien after July 31, 2001. When he was laid off in December 2002, Lien was working at a Cheddar's Restaurant job in Austin. According to Lien, only he and one journeyman were on the job at the time. The Respondent did not contradict Lien's testimony regarding his employment history with the Respondent and a summary of its records placed in evidence confirmed the dates of his employment.

It was during Lien's last period of employment in 2002 that the Union attempted to organize the Respondent's employees. Union organizer Robert Conner obtained employment with the Respondent and solicited other employees to join the Union. Lien testified that Conner first solicited him to sign a card while he was working at a job at Academy Stores in Austin but he declined to get involved. After he was transferred to the Cheddars job, Conner approached him again and this time he signed a card, before he was laid off by the Respondent. Lien

[3] Minikus has worked for the Respondent since 2001, primarily doing service work. Crowell was first employed by the Respondent in 1999 and, despite being fired in 2002, was re-hired in March and was still employed by the Respondent at the time of the hearing. The record contains no evidence regarding the initial hire dates or tenure of any other employees.

[4] Michelle Goodrum testified that the Respondent requires employees to fill out a new application each time they are hired unless the re-hire date is within three months of the individual's last employment with the Respondent. She explained that this is a way for the Respondent to ensure it has the most up-to-date address, contact information and other personnel data.

admitted that he did not tell Goodrum or any other representative of the Respondent that he had done so. According to Lien, after his lay off, he joined the Union.

Lien testified that, between December 16, 2002 and May 2003, he periodically called Goodrum and asked if he had any work. At one point, according to Lien, Michelle Goodrum told him that he was the "first one on the list" and that they would call him if they had any work. Lien also recalled being offered work on one occasion, helping Minikus pull wire, which he was not able to accept. Although Shayne and Michelle Goodrum confirm that Lien regularly contacted them looking for work, they deny telling him he was "first on the list." Lien testified further that, on Friday, May 9, Shanna Hendrix, the Respondent's receptionist, called him and asked if he was available to work the weekend. Lien told her he was available but needed a ride because he didn't think his car would make it to Temple, Texas, the location of the job. Lien asked Shanna if he could ride with one of the guys. Shanna said she would have to check. A short time later, according to Lien, Michelle Goodrum called back and told him he could ride with Minikus and to be at the shop at 6:30 AM on Saturday. Hendrix did not testify in this proceeding. Michelle Goodrum confirmed calling Lien about the job after being told by her husband that he needed Lien to work the weekend, helping Minikus get ready for a slab pour. According to Michelle Goodrum, she asked her husband if Lien was being put on as an employee and Shayne told her that it was only for the weekend, that she was to pay him on Monday for the hours he worked. Lien did concede, on cross-examination, that he understood, when offered the job on May 9, that it was only for the weekend.

On Saturday, May 10, Lien arrived at the Respondent's shop at about 6:30 AM. Mickey Crowell was already there, loading material onto his truck to take to the job. Lien helped him load the truck. Lien recalled that Minikus was also at the shop that morning, but he didn't remember what he was doing or where he was. According to Lien, Shayne Goodrum arrived a little after everyone else got there. Lien testified that Goodrum approached him and, after a bit of small talk, asked him if he had seen the union guys around. Lien replied that he hadn't. Goodrum then said to Lien that he "couldn't stress this enough, you got to watch what you say. They've been around. Don't tell anybody where you're working or how much money you're making, or don't give out the names of who's working for me." After further questioning by the General Counsel, Lien recalled that Goodrum also asked him if he had talked to the union guys. Lien testified that neither Minikus or Crowell were around during this conversation. Minikus could not recall if he went to the shop that Saturday morning or if he went directly to the job. He also could not recall if he had seen Goodrum at the shop in the morning before going to the job. Crowell recalled meeting Lien at the shop and giving him a ride to the job. He testified that, although it was possible Goodrum was there, he didn't recall seeing him at the shop that morning. Lien, Minikus and Crowell all testified that Goodrum typically did not get to the shop before 7:30 or 8:00 AM. None of the witnesses testified to ever having seen Goodrum at the shop that early on a Saturday morning before May 10.

Goodrum denied going to the shop before 9:00 AM that Saturday morning. According to Goodrum, he usually did not go into the shop until sometime between 7:30 and 8:30 during the week and rarely went to the shop at all on the weekend. Goodrum also testified that he would not have gone to the shop at 6:30 that particular Saturday morning because it was Mother's Day weekend and he had company at his house. Goodrum's wife corroborated his testimony regarding the times he usually went to the office and the fact that they had relatives visiting that weekend. Although it may be inferred from her testimony that it was unlikely that Goodrum went to the shop at 6:30 AM on Saturday morning May 10, she did not specifically testify that he did not go to the office that day. Shayne Goodrum also specifically denied having a conversation with Lien on May 10 and specifically denied ever making the statements attributed to him by Lien.

Lien testified further that after his conversation with Goodrum and after loading up the truck, he rode to the job in Temple, Texas with Crowell. He acknowledged, and Crowell confirmed, that he did not mention his conversation with Goodrum during the ride to the job. There is no dispute that Minikus, Crowell and Lien put in a full day, 9 hours, of work at Temple before returning to Round Rock so Lien could get his car. There is also no dispute that the work they were doing was laying PVC pipe under ground and stubbing it up in preparation for the pouring of the concrete foundation. Also present on the job were a number of day laborers obtained from a temporary employment agency who were digging and filling the trenches after the pipes were laid by the electricians.

On Sunday, May 11, Lien again went to the shop to meet Minikus and Crowell and to get a ride to the job. Lien, Minikus and Crowell continued doing the same work they had been doing on Saturday. There is no dispute that Goodrum visited the job on Sunday and took the three electricians to lunch at a Chinese Restaurant.[5] Lien testified that, during lunch, he asked Goodrum how long he was going to be used this time. According to Lien, Goodrum told him that he would be going to another job at an O'Reilly's Auto Parts store after he finished the work he was doing at Temple and that he would be there about a week. Lien testified that Goodrum also said that, by the time Lien was finished at O'Reilly's, the Temple job should have taken off and he would be working steadily there. Lien recalled, on cross-examination, that Goodrum also told Crowell that he would be going to O'Reilly's the next day while Lien and Minikus finished what they were doing at Temple. Lien admitted, also on cross-examination, that he did not mention this conversation in his pre-trial affidavit. Goodrum denied making any commitment of future employment to Lien during lunch. He testified that he may have discussed with Crowell and Minikus what they were going to be doing next, suggesting that Lien may have misinterpreted his comments. Crowell testified that he did not recall Goodrum telling Lien that he would be working at O'Reilly's after the weekend.

On Monday, May 12, Lien and Minikus returned to the Temple job to finish the preparation for the pour. Crowell went to the O'Reilly's job that day. According to Lien, he and Minikus put in four hours, finishing up the work, and returned to the shop around 1:00 PM. Lien recalled that Minikus said he had to go back to the shop to see Goodrum and that he and Lien would then go to O'Reilly's to help Crowell for the remainder of the day. Lien also recalled that it was raining that day but denied that he and Minikus were "rained out" at the Temple job. Minikus also recalled that, although it was raining, he and Lien were able to finish what they needed to do in Temple before returning to the shop. In contrast to Lien's recollection, however, Minikus recalled that he returned to the shop because Lien's car was there. Minikus testified that he then went home, not to O'Reilly's. He denied that there was any plan for him and Lien to work at O'Reilly's that day.

Lien testified that, after he and Minikus arrived at the shop, Goodrum took Lien aside and said he had to talk to him. According to Lien, Minikus told him he would go ahead to the O'Reilly's site and that Lien could meet him there.[6] Lien testified that he and Goodrum went out to the shop to talk and that no one else was present during their conversation. Goodrum opened this conversation by telling Lien that he wanted Lien to fill out an application. Lien asked why he needed to fill out an application since he had already filled out three of them during the time he'd worked for the Respondent. Goodrum indicated he agreed with Lien and said, "we'll just call it a

[5] Although Minikus had no recollection of going to lunch with Goodrum and the others, Goodrum admitted taking the guys to lunch. Crowell also recalled having lunch with Goodrum.

[6] As noted above, Minikus denied either having a plan to or going to O'Reilly's on May 12.

leave of absence." According to Lien, Goodrum then started talking about the union again, telling Lien to watch what he says, not to tell anybody who's working there and similar statements to those Lien claimed were made on Saturday. Lien testified that he became upset hearing these things because he had joined the Union since his December lay-off, so he interrupted Goodrum, saying: "Hey Shayne, I'm a union member." According to Lien, Goodrum became angry and asked, "Why would you crawl into bed with those people?" Lien testified that Goodrum also told him he had "f---ed up", that Lien wouldn't find any more work because all the other contractors would see his name on a list and would not hire him. Lien testified that Goodrum then mentioned union organizer Rob Conner, saying that he wouldn't want to have Conner's job because "people like that can get beat up or easily---badly hurt, or even killed." Lien also recalled Goodrum asking him if he had signed a card. When Lien admitted he had, Goodrum replied that he couldn't believe it, "we had a meeting at our shop, we got all the foremans together and the girls in the office, and we all had a meeting on who signed that card, and I [Goodrum] was the only one saying you didn't sign it. You let me down." According to Lien, Goodrum also asked him if he wanted to stay in the Union, saying that if he did, he and Lien would have to part ways, but if he didn't, Goodrum would talk to his attorney about how Lien could get out of the Union. Lien told Goodrum that he wanted to get out of the Union because he needed to work. Goodrum told Lien he would see what he could do.

Lien testified that this conversation ended when he asked Goodrum for his check, for the weekend's work. Goodrum told him that Michelle was supposed to put "material" on the check to avoid some undisclosed problem. Lien suggested being paid in cash, to "cover you're a--." Goodrum agreed and told Lien to come back the next day to get his pay. Lien recalled that he returned the next day and picked up the cash payment. According to Lien, he also asked about his tools, which he had left in Minikus' vehicle. Because the tools were not at the shop and because his pay was short, he had to go back again on Thursday, at which point he got his tools and the remainder of his pay. On his last visit to the Respondent's shop, Lien asked Goodrum about working for the Respondent. Goodrum told Lien he still had to talk to his attorney. When Lien told Goodrum to give him a call, Goodrum replied, "don't call me anymore, come by the shop if you want to talk to me." Lien had no further contact with Goodrum until the hearing. Lien did contact the Union sometime later and initiated the filling of the instant charge by providing a statement to Conner.

Goodrum acknowledged having a conversation with Lien in the shop on Monday, May 12, but denied making the statements attributed to him by Lien. According to Goodrum, he approached Lien to give him his check, which his wife had made out that morning. However, because Michelle Goodrum had not included pay for the four hours Lien worked that day, Goodrum told him he would have to cut him another check. It was at this point, according to Goodrum, that Lien suggested being paid in cash. He and Lien then arranged for Lien to return the next day to get his pay, which he did. Goodrum denied that Lien came back on both Tuesday and Thursday.[7] Goodrum acknowledged that Lien told him on May 12, after the discussion about his pay, that he had joined the Union. Goodrum recalled that Lien volunteered this information and then went on a "rip, saying I wish I hadn't done it, I want to get out, … I need you to help get me out, I need you to call your attorney…to see if he can get me out of the Union." Goodrum remembered this conversation lasting as long as 20 minutes, testifying that "things were said". While denying the specific Section 8(a)(1) allegations, Goodrum did not testify regarding his side of this 20-minute conversation. When questioned by the General Counsel, during his examination under Rule 611(c) of the Federal rules of Evidence, Goodrum

[7] This testimony was corroborated by Michelle Goodrum who recalled having Lien's full pay, in cash, on Tuesday and denied seeing him at the shop after Tuesday.

specifically denied making any threats regarding union organizer Conner. Goodrum claimed that, although he learned after hiring Conner that he was a union member who was trying to organize his employees, he had "no problems" with Conner although he didn't always agree with Conner's actions. However, when the Charging Party's representative pursued this line of questioning, Goodrum's animus toward Conner became apparent. Among the litany of "problems" Goodrum admitted having with Conner's actions were Conner's filing of unfair labor practice charges that Goodrum believed were false.

Goodrum also testified that Minikus was present and participating in the discussion about the Union on Monday, May 12. He did not recall Minikus being present when Lien returned the next day to get his cash. Minikus testified that he was present when Lien told Goodrum that he had joined the Union. Minikus recalled seeing Goodrum hand Lien his pay and heard Lien say he had joined the Union and had been working for them, but he wanted to get out. He recalled Lien asking Goodrum for help getting out of the Union. Minikus, whose recollection of this conversation was vague, recalled Goodrum telling Lien there wasn't much he could do for him other than talk to some people and get information for him. Minikus denied, in response to a series of leading questions from the Respondent's counsel, that Goodrum made any of the alleged Section 8(a)(1) statements attributed to him by Lien. On cross-examination, Minikus recalled having another conversation with Lien, in the shop, in which Minikus asked Lien how he got mixed up with the Union. Minikus recalled that this conversation occurred in the shop, around 9:30 in the morning, and that Goodrum was not around. On further questioning on cross-examination, Minikus recalled that it was more likely cash than a check that he saw Goodrum hand Lien before the conversation about the Union. This would suggest that Minikus was actually present on Tuesday when Lien returned to get his cash.

When describing this sequence of events on direct examination, Lien did not identify anyone else being present during any of his conversations with Goodrum. After Goodrum and Minikus testified that Minikus was in fact present for at least one conversation between Goodrum and Lien in which the union was discussed, Lien was recalled in rebuttal and claimed that the conversation where Minikus was present was on the Tuesday or Thursday when he returned to get his cash and tools. Lien could not recall with any certainty which day it was. Although the Respondent's counsel attempted to show that Lien's testimony on rebuttal was inconsistent with his testimony on direct and in his pre-trial affidavit, in reality it was remarkably consistent throughout. Lien did admit that at no time did Goodrum tell him he was fired.

Goodrum denied firing Lien on May 12. According to Goodrum, he instructed his wife to call Lien around May 9 to see if he was available to work the weekend, after Minikus told him he could use some help to finish laying the underground pipes in preparation for the foundation pour. Goodrum testified that he decided to offer this work to Lien because Lien had recently called him asking if he had any work. Goodrum denied that he had any intention of hiring Lien for any work beyond the weekend. As noted above, Goodrum denied speaking to Lien on Saturday morning before Lien went to the job in Temple. According to Goodrum, he did not see Lien until he visited the job and took the men to lunch on Sunday. Also as previously noted, Goodrum denied making any promise of future work to Lien while they were at lunch that Sunday. Goodrum testified that Lien's employment ended on Monday, May 12, under the terms agreed upon when Lien was offered work for the weekend. Because the pre-pour work was finished, there was no need to keep Lien on. Goodrum testified that there was barely enough work at the time to keep Minikus and Crowell, the Respondent's only employees in the field, busy.

The Respondent's records, as shown by summaries of those records offered at hearing, tend to support Goodrum's testimony regarding the work that was available on and after May

12. Minikus and Crowell were working an average of 40 hours a week, with some minor amounts of overtime, through the remainder of May and into June. Although Crowell's hours increased a bit in the first half of June, they returned to 40 hours or less by July. The Respondent's records also show that the Respondent had only the two jobs, the Hilton Garden hotel in Temple where Lien worked on Mother's Day weekend, and the O'Reilly's job in Austin. According to Goodrum, the O'Reilly's job did not require more than one journeyman on a steady basis with occasional help during busy stages. That job was finished by August. Although there was a substantial amount of work to be done on the Temple job, that job fell behind schedule and also proceeded in fits and starts. The work on that job was still in progress at the time of the hearing.

The Respondent's records also show that it did not hire any apprentices, after Lien's employment ended on May 12, until July 14, two months later. On that date, the Respondent hired Zachary Johnson, another apprentice who had previously worked for the Respondent. Goodrum described Johnson as a fourth-year apprentice and claimed that he was more qualified than Lien. Johnson was still working for the Respondent at the time of the hearing. On August 20, the Respondent hired another apprentice, Gabriel Flores, whom Goodrum described as having the skills of a journeyman without the license. Flores quit on October 10. Johnson and Flores worked at the Temple job. The Respondent's records show that the Respondent hired three other apprentices who were still employed at the time of the hearing, i.e., Miguel Rosas on September 25, Charles Napper on September 29, and Aaron Lively on November 5. Goodrum testified that Lively was a two-year apprentice, the same skill level as Lien. Goodrum also testified that Lively had not worked for the Respondent before. According to Goodrum, Lively was recommended by another contractor. Goodrum was not asked about the skills, experience or referral source of Napper and Rosas. When asked why Lien wasn't offered any work on the Temple job after May 12, Goodrum testified that Lien was not a "proven" former employee, citing his poor attendance record during previous periods of employment and his inferior skills relative to those apprentices who were hired.[8]

B. Analysis and Conclusions

1. *Section 8(a)(1) Allegations*

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act in several respects during the conversation with Goodrum that Lien described as occurring in the shop on Saturday morning May 10. Resolution of this allegation turns almost exclusively on credibility because Goodrum denied that he even had a conversation with Lien that day. By Lien's own account of the incident, no one else was present when the conversation occurred, even though both Crowell and Minikus were at the Respondent's facility at that time. The only evidence offered by the General Counsel in support of this allegation is thus Lien's uncorroborated testimony.

The General Counsel contends that the Respondent promulgated an unlawful rule prohibiting employees from discussing their wages when Goodrum told Lien not to tell anyone what he was making, and that Goodrum's instruction to Lien not to tell anybody where he was working or who was working for the Respondent unlawfully interfered with Lien's right to engage in protected concerted activities. The General Counsel argues further that Goodrum unlawfully interrogated Lien when he asked Lien if he had talked to the union guys. If Lien's testimony

[8] Goodrum could not adequately explain why Lien was paid $1/hour more than Johnson despite being less qualified.

were believed, there would be no question that the Respondent violated the Act as alleged on May 10. Unfortunately, I do not believe Lien and, crediting Goodrum, find that no such conversation occurred.

Although Lien appeared to hold up well on cross-examination and, for the most part, testified consistently with the story he gave in his pre-trial affidavit, there were several flaws in his testimony that cannot be overlooked. Most significant was the omission from his affidavit of any mention of the lunch at the Chinese Restaurant on Sunday, May 11, during which he claims that Goodrum promised him employment after the weekend. Because Lien acknowledged that he was initially offered only work for the weekend, this conversation was critical to establishing that he was in fact terminated on May 12. It is inconceivable that Lien would simply have forgotten to mention it when giving a statement in support of the charge filed on his behalf by the Union. Lien also displayed an overall inability to recall dates, times, even places where he had lived in the last two years, essentially anything that did not fit into the story that had been reduced to writing in the affidavit and attached notes of his interview by the Union's organizer. These issues with his demeanor and the critical omission from his affidavit casts doubt on Lien's overall credibility.[9]

I also found that Lien's claim that Goodrum came to the shop to discuss the Union with him at 6:30 on Saturday morning is not believable when considered in the context of other evidence. All of the witnesses, including Lien, testified that Goodrum typically did not arrive at the Respondent's shop before 7:30 or later, and that he was even less likely to be there that early on a weekend. To believe Lien, one would have to find that Goodrum made a special trip to the shop that morning just so he could talk to Lien about the Union. While such a scenario is possible, particularly if the Respondent were in the midst of an organizing drive, there is no evidence that the Union "had been around" or was attempting to organize the Respondent's employees in May. In fact, from the other evidence in the record, it appears there had been no union activity involving the Respondent's employees since December. Moreover, the only two employees the Respondent had at the time, Minikus and Crowell, were relatively long-term employees with no interest in the Union. Other than Lien himself, to whom would the Union have been talking? Lien's testimony that such a conversation occurred when it did simply makes no sense.[10]

Accordingly, based on credibility, I shall recommend that paragraphs 7(a)-(c) of the complaint, relating to the May 10 allegations, be dismissed.

The complaint alleges that the Respondent also violated Section 8(a)(1) of the Act on May 12 during the conversation between Lien and Goodrum that occurred in the shop when

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[9] The Respondent attempted to place in evidence records showing that Lien had prior convictions for various criminal offenses. Because none of the proffered convictions met the test set forth in Rule 609 of the Federal Rules of Evidence, I rejected the proffer. I shall adhere to my ruling here. *S.C.A. Services of Georgia,* 275 NLRB 830, 833 (1985), cited by the Respondent in its brief, is clearly distinguishable. The conviction there was recent and involved a felony punishable for a period in excess of 1 year involving making false statements and other conduct indicating a lack of truthfulness. No evidence of a similar conviction was proffered here.

[10] I also note that, on cross-examination, Lien had a tendency to embellish his testimony by volunteering testimony about allegedly anti-union statements made by Goodrum during Lien's previous period of employment. Since such statements would be evidence of the Respondent's animus, it is curious that they were not brought out as part of Lien's direct testimony. In all probability, even these anti-union comments never occurred.

Goodrum attempted to pay Lien for his work that weekend. Goodrum admitted having a conversation with Lien that date and further admitted that Lien told him during this conversation that he had joined the Union. Lien and Goodrum disagree regarding how Goodrum reacted to this news. Although Goodrum testified that Minikus was present for this conversation and Minikus recalled being present for a similar conversation, I find that the conversation at which Minikus was present occurred on Tuesday May 13. Minikus, although vague as to most details, did have a recollection of seeing Goodrum hand Lien cash, rather than a paycheck. There is no dispute that Goodrum did not hand Lien cash until Tuesday. Thus, as with the May 10 allegation, there are no corroborating witnesses for either side and resolution of these allegations turns on whether Lien or Goodrum is more believable.

The General Counsel claims, based solely on Lien's testimony, that the Respondent committed several violations during the May 12 exchange. Specifically, the complaint alleges that the Respondent implicitly threatened employees with bodily injury because of their union membership, activities and support when Goodrum allegedly said to Lien that he wouldn't want Union organizer Conner's job because "people like that can get beaten up, badly hurt or even killed." The complaint alleges that Goodrum created the impression of surveillance of employees' union activities when he allegedly told Lien that there had been a meeting of the foremen and office personnel at which they tried to determine who had signed cards and at which Goodrum stood up for Lien by telling the others that he didn't believe Lien would sign a card. The complaint further alleges that Goodrum, by telling Lien that he and Goodrum would have to go their separate ways if Lien stayed in the Union, but that he could work for the Respondent if he got out of the Union, unlawfully solicited Lien to withdraw from the Union and conditioned Lien's continued employment upon his withdrawal from the Union. The General Counsel also relies on Goodrum's allegedly offering to assist Lien in his efforts to get out of the Union as an unlawful solicitation of withdrawal from union membership. As previously noted, Goodrum denies making any of these statements and claims that it was Lien who volunteered that he wanted to get out of the Union, asking Goodrum for help in doing so.

I have already noted the doubts I have regarding Lien's overall credibility. Although I have credited Goodrum's denial regarding the May 10 conversation, his overall demeanor and testimony were not the epitome of candor. I found Goodrum to frequently be evasive and non-responsive on cross-examination. His testimony that Lien was not a "proven" former employee is laughable in light of the fact that he repeatedly rehired Lien and even offered him work on May 9 despite the problems he assertedly had with his reliability. Similarly, Goodrum testified that he "rarely" transferred employees from job-to-job, despite the undisputed fact that Lien was frequently moved from job to job rather than being laid off at the completion of a job. This fact also undermines Goodrum's claim that Lien was not a proven employee. Finally, I found Goodrum's attempts to explain the application of his hiring policy, which generally favors loaned or temporary employees over former employees, to be dubious.[11] The fact that neither witness inspires trust makes resolution of these allegations especially difficult.

There is no dispute that, during a conversation with Goodrum on May 12, Lien volunteered the information that he had joined the Union. While Lien claims that Goodrum reacted angrily and essentially told him he had to get out of the Union if he wanted to work for the Respondent again, Goodrum claims it was Lien who expressed remorse at having joined the Union and sought help in getting out. Considering all the evidence in the record, and the relative

[11] Despite the existence of this purportedly formal hiring policy, Goodrum apparently had sole discretion to deviate from it and hire whomever he pleased based on the needs of the particular job at issue.

burdens of persuasion, I am inclined to accept Goodrum's version of this conversation over that of Lien.[12] Lien had much to gain from his version of the conversation, more than Goodrum had to lose. Moreover, Minikus recollection of the later conversation he was involved in tends to corroborate Goodrum. Minikus also recalled that Lien expressed regret over his decision to join the Union and indicated a desire to get out of it. Minikus was a generally credible witness, to the extent he was able to recall things, and had nothing to gain from lying in this proceeding. His testimony convinces me that, based on Goodrum's version, Lien was the one who solicited Goodrum's assistance to withdraw from the Union. I also credit Goodrum's testimony that, although he offered to talk to some people to get information for Lien to use in getting out of the Union, he did not encourage or otherwise solicit the withdrawal. *R. L. White Company, Inc.,* 262 NLRB 575, 576 (1982); *Perkins Machine Co.,* 141 NLRB 697 (1963). I shall also credit Goodrum's denial that he made the statements upon which the General Counsel relies for the creation of surveillance allegation, and Goodrum's denial of the implicit threat regarding Conner.[13]

Accordingly, based on credibility, I shall recommend that complaint paragraphs 7(d) through (g), relating to the May 12 conversation, be dismissed.

2. Lien's termination

The complaint alleges that the Respondent discharged Lien on May 12, in violation of Section 8(a)(1) and (3) of the Act, because he formed, joined or assisted the Union and engaged in concerted activities, and in order to discourage its employees from engaging in such activities. Because resolution of this issue turns on employer motivation, the test adopted by the Board in *Wright line, Inc.,*[14] applies. Under this test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that union or other protected concerted activity was a motivating factor in the employer's actions. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this activity, and the existence of anti-union animus that motivated the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. See *Naomi Knitting Plant,* 328 NLRB 1279 (1999) and cases cited therein. If the General Counsel meets his burden, then the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity.

Lien's uncontradicted testimony, that he joined the Union after his last employment with the Respondent ended in December 2002, satisfies the first element of the General Counsel's

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[12] The Board has sometimes resolved allegations similar to those at issue here on the basis of a preponderance of evidence standard, rather than a strict credibility resolution, where nothing in the demeanor of either witness or their testimony would enable the trier of fact to determine who is more truthful. See *National Telephone Directory Corp.,* 319 NLRB 420, 422 (1995).

[13] I have considered Goodrum's testimony on cross-examination displaying some hostility toward Conner, particularly based on Goodrum's belief that Conner had not been truthful in his dealings with the Respondent. I find that whatever hostility Goodrum had was not enough to lead him to threaten Conner, implicitly or explicitly, with bodily injury.

[14] 251 NLRB 1083 ((1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982). See also *Manno Electric,* 321 NLRB 278, 280, fn. 12 (1996).

case. It is irrelevant that Lien did not attempt to solicit any other employees to join the Union, or that he acted alone in becoming a union member. The Act explicitly protects the activity of a single employee in joining a union. There is no need for further proof of "concerted activity." Goodrum admitted being aware, from his conversation with Lien on May 12, that Lien was a union member, thus satisfying the second element of the General Counsel's case. Because I have discredited Lien's testimony regarding the May 10 and May 12 conversations, there are no independent violations of Section 8(a)(1) of the Act to establish anti-union animus. Nor is there any direct evidence of an unlawful motivation behind the Respondent's termination of Lien on May 12. In order to meet his burden under *Wright line,* supra, the General Counsel must rely on circumstantial evidence to prove that Lien's employment ended because Goodrum learned of his having joined the Union.

The preponderance of the evidence in the record before me does not support a finding that the Respondent in fact discharged Lien because he joined the Union. Lien himself admitted he was only hired for the weekend and that he expected to be paid at the conclusion of his work, on Monday, May 12. This is consistent with the testimony of Mr. and Mrs. Goodrum regarding the terms of the employment offered to Lien on May 9. It is also consistent with the other evidence in the record, including the credible testimony of Minikus and Crowell, that there wasn't sufficient work to keep Lien employed beyond that weekend. The only evidence that Lien had some expectation of continued employment that ended after he disclosed his union membership to Goodrum is Lien's testimony regarding what Goodrum said during lunch at the Chinese restaurant in Temple on Sunday, May 11. I have already noted my reservations about this testimony based on Lien's failure to mention this incident before the hearing. Although Lien identified Minikus and Crowell as being present when Goodrum allegedly made this commitment, neither corroborated him.[15] The fact that there was no work for Lien to do after May 12, at either Temple or the O'Reilly's job, further undermines his credibility. I note, in particular, that the Respondent did not add another apprentice for more than two months after Lien's weekend work was finished. Based on the above, I shall discredit Lien's testimony regarding the statements attributed to Goodrum on Sunday, May 11.

Having found that Lien's employment was due to end on Monday May 12, irrespective of his union membership status, it follows that the General Counsel has not met his burden of proving an unlawful motivation behind Lien's termination of employment on that date. Accordingly, I shall recommend dismissal of this allegation of the complaint. At the same time, the fact that Lien has not worked for the Respondent since revealing his status as a union member stands in marked contrast to his prior employment history. The record shows that Lien worked on and off for the Respondent, on a number of jobs, for three years. Although Respondent had hired at least four apprentices between July 14 and November 5, including at least one, Lively, who was at the same level as Lien, it apparently had no work for Lien. This raises a suspicion that this sudden lack of work opportunity for a previously favored employee was motivated by the employee's having joined the Union.[16] Unfortunately, the complaint does not allege any failure to hire Lien on and after July 14 as a violation of the Act and this issue was not fully and fairly litigated at the hearing. While there was some testimony regarding the hiring of a few of the other apprentices and reasons were offered for the failure to consider Lien

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[15] Minikus did not even remember going to lunch with Goodrum and the others. Crowell recalled going to lunch but did not remember Goodrum making any statements about Lien working with him at O'Reilly's after the weekend.

[16] As previously noted, I found Goodrum's belated efforts to denigrate Lien's status as a "proven" former employee wholly incredible and contrary to Goodrum's own history of hiring and rehiring Lien.

for these openings, the record is not complete enough to make any finding regarding the Respondent's true motivation.[17] Accordingly, because the allegation was not pleaded nor litigated, I shall make no finding here whether the Respondent's failure to employ Lien on and after July 14 violated the Act.

Based on the above, including my finding that Lien was not discharged on May 12 because of his union membership and activities, I shall recommend dismissal of paragraphs 8 and 9 of the complaint.

Conclusions of Law

1. The Respondent did not, through any oral communications on May 10 and 12, 2003 between its president Michael Shayne Goodrum and employee Mike Lien engage in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondent, by terminating Lien on May 12, 2003 did not engage in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[18]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

[17] Goodrum did testify that he would hire Lien again if he had an opening for which Lien was qualified.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.